Editor's note: Affirmed -- aff'd Civ.No. 83-842 PHX-CLH (D.Ariz. Aug. 8, 1984)

UNITED STATES
v.
MARY BELEN ROSENBERGER

IBLA 81-707 Decided March 14, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring the Santa Clara lode mining claims Nos. 1 through 8 invalid. A 12302.

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery

Where the Government contests the validity of a mining claim on a charge of lack of discovery, it bears only the burden of establishing a prima facie case that a discovery has not been made. The mining claimant then has the ultimate burden to establish the discovery of a valuable mineral deposit within the limits of the claim by a preponderance of the evidence. The contestee in a mineral contest must prevail, if at all, upon the strength of his own case, rather than upon any weakness of the Government's case.

APPEARANCES: Stephen P. Shadle, Esq., Yuma, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is taken from the April 30, 1981, decision of Administrative Law Judge Robert W. Mesch declaring the Santa Clara Nos. 1 through 8 lode mining claims invalid for lack of discovery of valuable minerals on the claims.

The Arizona State Office, Bureau of Land Management (BLM), instituted Contest No. Arizona 12302, by issuing a complaint charging, among other things, that the claims were invalid because they had not been perfected by the discovery of a valuable mineral deposit. The appellant denied the charges

charges and on December 11, 1980, a hearing was held before Judge Mesch, in Yuma, Arizona.

The claims were located in 1910 and 1912 by appellant's father, J. L. Venegas, and two other individuals. The present (contestee-appellant) inherited her interest from her father.

Actual workings on the claims consist of several surface cuts, a few short drifts or tunnels, and a shaft, all of which predate November 6, 1942, when the land was withdrawn from all forms of appropriation and reserved for the use of the War Department as an aerial gunnery and bombing range. The War Department leased the claims, paying a nominal annual rental. Since the withdrawal in 1942, the claimants have been barred from access to the claims because of the military activity, although, upon rare occasion, permission has been granted to visit the claims briefly. At the present time, the claims are the subject of a condemnation action brought by the United States, and the contest proceeding was initiated to determine whether the claims, or any of them, are valid, in order to ascertain whether the claimants are entitled to compensation. This procedure comports with Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

The claims were examined in July 1978 by three minerals specialists employed by BLM. They were accompanied by the contestee's son, Charles Rosenberger, the grandson of the original locator. The BLM mineral examiners took nine samples, all from locations suggested by Rosenberger (Tr. 40). No samples were taken on the basis of the examiners' own independent judgments of which sample sites would most likely be mineralized (Tr. 41, 51), although one examiner testified that he probably would have sampled one site even had it not been selected by Rosenberger (Tr. 45). All samples were taken at the surface, except 4A and 4B, which were taken inside a drift. One 50-foot drift was occupied by a rattlesnake (Tr. 39), or, as Rosenberger testified, "Several of the tunnels we couldn't go in because we had a pretty good size pile of rattlesnakes in there quite a long ways in," (Tr. 114), so no samples were taken from inside. The main vertical shaft (of 80 to 100 feet) was not entered or sampled because the examiners "had no lines, ropes to let ourselves down in there;" because part of the walls had caved in, perhaps due to an earthquake; and because the ladders and mine hoisting equipment had been vandalized and broken (Tr. 67, 115).

The samples taken during that examination were assayed for gold, silver, and copper by an independent laboratory (Tr. 63). The results indicated very low values for these minerals (Tr. 73-80; BLM Exh. 15, 16). Based upon the assay reports and their observations at the site of the claims, the BLM witnesses were of the opinion that no qualifying discovery of a valuable mineral deposit could be verified.

On cross-examination of BLM's mineral examiners it was established that they were aware that Charles Rosenberger had no background in geology, minerals or mining, and no special qualifications which would enable him to

select appropriate sample sites. They testified, however, that since he was present as the claimant's representative, they had an obligation to sample the points which he chose.

Charles Rosenberger testified that he was born in 1922, and that he had last been on the claims in 1936, when he was not yet 14 years old (Tr. 110). His only experience with mining dated back to his childhood when his relatives gave him a dollar a day to hand-sort different types of rock from one pile to another, "* * * but I didn't really know what I was doing." (This was at a different mining venture, in California (Tr. 112)). Asked if he selected the sample points, he explained:

> A. And they did ask me, "Where do you suggest we take samples from?" Well, I know from experience that green and blue come out pretty good copper stain, and pink or orange or something like that comes out silver, but there's a lot of green and blue out there, and red. There was some white.
>
> Q. Uh-huh.
>
> A. It looked good.
>
> Q. So from your standpoint, not based on geology, but just what you thought might be a place where there was mineralization, you would look at some blue rocks or colored rocks and you'd point to that one, and that's where they'd take the sample?
>
> A. Well, bluntly, that's about what it amounts to. But it looked good, didn't it?

(Tr. 113, 114).

Following the examination described above, the claimant employed an apparently well-qualified consulting geologist, John Rud, to examine the claims and provide his opinion. On March 29, 1980, Rud conducted his own examination, accompanied by one of the BLM examiners who had previously inspected the claims, and by the contestee's attorney. Rud's report of that examination was introduced in evidence as contestee's exhibit 2. However, that report and Rud's testimony at the hearing were concerned almost exclusively with the geology of the claims, and did not address the extent of the mineralization or the economics of exploiting what might exist on the claims. Although Rud took samples, he did not have them assayed, but instead examined them under a microscope to study their structure, saying, "I did not think the samples I channeled and so forth would be indicative of any mineralization" (Tr. 107). Based upon his observation of the geology, Rud was of the opinion that "[t]he Venegas mine has considerable merit, and I would recommend an extensive geological and geophysical program to determine its overall economic potential" (Tr. 103). This, he added, would require extensive drilling.

> Q. And only then could a really complete survey of the total value be established?
>
> A. That's right. You'd have to do a complete geological program on it, which would entail mapping the area, determining the structures. We're in the Basin Range -- most of it is fault-controlled. You would want to determine all the faults, the strike length, which are very substantial in the Basin Range, especially in Yuma, and then proceed with a very detailed sampling, and then with it followed up, perhaps you would use an IP -- induced polarization geophysical survey -- and then drilling out the anomalies. And doing it under a very step by step basis, too. It cannot be done just by throwing drills in there, no. You have to go through the ritual.

(Tr. 106).

Rud made no effort to form an opinion as to whether the work done on the claims prior to the withdrawal was, or reasonably could have resulted in, an economically viable venture, saying "* * * The overall economics at that time, I do not know, but in today's -- with today's prices, and today's interest in mining and the availability of funding, that it's -- at this time, I would say that extensive work can be done on this to prove its overall economic potential" (Tr. 105). As to what the claimants were doing at that time, he said "* * * It appears from them sinking their shafts and so forth, I would assume that they were after gold. Copper was not of high interest at the time" (Tr. 99). However, some of his testimony concerning the present potential value of the property related to geologic indications "of copper mineralization with depth" (Tr. 104).

The contestee, Mary Belen Rosenberger, was apparently of the opinion that her father thought of the claims as copper locations. She described an investment negotiation concerning the claims that fell through in the financial crash of 1929, because "[t]he first thing that went down in 1929 was copper. So that was the end of that deal" (Tr. 129, 130). She also described the gassy condition of the workings and related how her father had been told that if there were not rich deposits of copper underneath those gases would not come out (Tr. 132, 133-35). She testified that all of those who worked on the claims or who had first-hand knowledge of them are now dead. However, she was able to supply the affidavit of Elfren Swift, who drove a truck for the laundry owned by the contestee. The gist of Swift's statement was that in 1936, 1937, and 1938 he transported four men from Yuma to the claims, where they performed the annual assessment work for each of those years, and then drove them back to Yuma (Contestee's Exh. 3). However, the contestee had no knowledge of any actual production from the claims.

> Q. Do you know or have any recollection of where your folks sold the ore that they brought in from the mine?
>
> A. I don't remember a thing about that. That was way before my time.

Q. Are there any records existing that show where the ore was sold, do you know?

A. No, sir, I don't think -- I don't know if there are.

(Tr. 141). 1/

She also testified that in 1976 she was approached by two lawyers who had a proposal to work the claims, but the Government refused to authorize it (Tr. 130-31).

A publication of the Arizona Bureau of Mines, published in 1933, contains a one-paragraph mention of the claims captioned "Venegas prospect." It describes the location, access, and general geology, and states, "Workings on this prospect consist of several surface cuts, a shallow shaft, and a few short tunnels" (BLM Exh. 7).

On appeal from Judge Mesch's decision holding the claims invalid, counsel for appellant contends vigorously that the invalidation of the claims in the prevailing circumstances would be grossly inequitable. He points out that when the Government "took over" the claims in 1942, the shaft and all other workings were easily accessible and capable of inspection. He acknowledges that in a normal situation a claimant has the responsibility to keep the discovery points open for inspection by Government examiners, but in this case the claimants were precluded from entering the claims or performing any work. Moreover, it is asserted that the workings became inaccessible solely because the Government breached its own duty as lessee of the property to maintain it in good condition and failed to prevent vandals from destroying virtually all the equipment there. Since expert testimony indicated that any significant mineralization would occur at depth, it is argued that the samples taken by the BLM examiners could hardly be considered as representative of what the claimants had found in the shaft and other inaccessible workings, and that therefore the Government had failed to make a prima facie case of invalidity.

The Board would agree that, under the circumstances, the ordinary rule that the claimant is obliged to keep discovery points open and available for inspection is not applicable in this instance. Cf. United States v. Jones, 67 IBLA 225 (1982). Also, in this instance, if the Government's prima facie case depended entirely on the assay results of the surface samples taken only at points selected by Charles Rosenberger, it would be dubious that a prima

1/ Although these questions assume the fact that "ore" was "brought in from the mine" and sold, and despite the claimant's contentions on appeal that the testimony shows that her predecessors in interest "had extracted large quantities of ore from the claim," this is not borne out by the record. The only reference to ore being brought back from the claims concerns "the rocks or the ore, they used to bring in a bag, some ore from each claim, and they would mark it, that sample from each claim, and they would bring it to the assayer's office" (Contestee, Tr. 142). There is nothing in the record to show that any ore was ever sold.

facie case had been made. 2/ But our conclusion does not rest on these considerations alone.

[1] The preponderance of the evidence in this case supports a finding that no discovery of a valuable mineral deposit was ever made on any of the contested claims, or that if such a discovery was made, that it was subsequently lost, either through exhaustion, or by an alteration in economic circumstances, or by geologic anomaly. See, e.g., Mulkern v. Hammit, 326 F.2d 896 (9th Cir. 1964).

As heretofore noted, the claims were located in 1910 and 1912 by J. L. Venegas, the contestee's father (Charles Rosenberger's grandfather), and two others. Appellant testified that she had no recollection of any ore being brought in and sold because "That was way before my time." The record does not disclose her age, but her son, Charles, testified that he was born in 1922 (Tr. 110), only 10 and 12 years after the claims, respectively, were located. Assuming then, that in 1922 the contestee was a very young woman, any ore shipment and sales would have had to have occurred very shortly after the claims were located to predate her awareness and recollection. As observed in note 1, there is nothing in evidence to indicate that ore shipment and/or sales occurred at any time in the history of these claims, but if any did occur, the evidence strongly indicates a discontinuance prior to 1922. Thus, in the 20-year period from 1922 to 1942, there was no commercial production of mineral.

This Department and the courts have long held that where, over a sustained period of several years, the claimant has failed to engage in productive extraction of mineral from the claim, a presumption is raised that there has been no discovery of a valuable mineral deposit or that the market value of discovered minerals was not sufficient to justify the costs of extraction, which presumption is, of itself, adequate to constitute a prima facie case of the claim's invalidity. This rule reflects the principle that in the varying economic climate over a period of many years, a mining claim will usually be put into production unless it is not commercially feasible to do so profitably; that is, unless the mineral is not marketable at a profit. United States v. Alaska Limestone Corp., 66 IBLA 316, 320 (1982) (appeal pending); United States v. Hess, 46 IBLA 1, 7 (1980); see United States v. Zweifel, 508 F.2d 1151, 1156, n.5 (10th Cir. 1975).

Another element of the Government's prima facie case is the Arizona Bureau of Mines 1933 publication describing the "Venegas prospect" without

2/ The Board acknowledges that it was appropriate for the examiners to sample the more attractive sites indicated by Charles Rosenberger, since he was the only representative of the claimant on hand. But it was also known to the examiners that he had no knowledge of what his grandfather had been pursuing on the claims, and no personal qualifications in mining or geology. The Board would have preferred that the examiners also have used their own expert qualifications to independently select appropriate sample sites, as they would have been expected to do had they been unaccompanied.

mention of any production or a description of any ore body (BLM Exh. 7). The workings described in 1933 correspond closely to those which exist today, suggesting that the assessment work performed annually to satisfy the requirement of 30 U.S.C. § 28 (1976) consisted of maintaining and perhaps extending those workings. The characterization of the site as the Venegas prospect, rather than the Venegas mine supports an inference that the author did not regard it as more than a prospecting endeavor at that time. The sample-taking and assaying by the claimants would be consistent with such an endeavor. The testimony of the contestee that an old mining engineer had told her father that the noxious gases in the shaft indicated that there were rich copper deposits underneath (Tr. 135) suggests that the shaft was being sunk in an effort to reach the rich deposits believed to be there, but there is absolutely nothing in the record to indicate that an actual ore body was ever exposed. 3/

Admittedly, the Government's prima facie case was weakened by the inability of the examiners to inspect and sample the inaccessible workings. But a prima facie case was made, nonetheless, on the basis of their testimony that they had found the evidence of mineralization insufficient to verify that a valuable deposit of mineral had been discovered as a matter of fact. United States v. Beckley, 66 IBLA 357 (1982). The burden then shifted to the contestee to show by a preponderance of evidence that a qualifying discovery had been made within the boundaries of each of the contested claims. 4/ United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). To prevail, the contestee, as the true proponent of the rule or order, must do so on the strength of a preponderance of her own countervailing evidence rather than upon any perceived weakness in the Government's prima facie case. United States v. Jones, 67 IBLA 225 (1982).

Clearly, the claimant has failed to present such evidence in this case. There is no record of any ore production and sale, there are no assay reports, there is no testimony by witnesses who saw an ore body. In short, there is no evidence of any kind to indicate the nature, extent, quality or value of the mineral deposit(s) allegedly discovered. Indeed, we are left to wonder whether the target of this venture was gold or copper. Rud, the consulting geologist who testified on behalf of the contestee, opined that the original claimants were after gold, and he based his opinion of the claims' validity on his analysis of the geological probability that richer gold values would be found at depth (Tr. 98), although he also testified that he would expect copper mineralization at depth (Tr. 104). The contestee, however, was

3/ Technically, "ore" means mineral of sufficient value to be mined at a profit. A Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, Dept. of the Interior (1968).

4/ Eight claims are involved in this action (the Santa Clara Nos. 1-8), but no one was able to identify the specific claim sites and boundaries (Tr. 28, 29). Even assuming that a qualifying discovery could have been shown to exist in one of the inaccessible workings, it is unlikely that this would have benefitted more than one of the claims. See United States v. Melluzzo, (Supp. on Judicial Remand), 32 IBLA 46, 59 (1977), aff'd, Melluzzo v. Watt, 674 F.2d 819 (9th Cir. 1982).

apparently under the impression that her father had been interested in the potential of the claims for copper (Tr. 135).

Lacking any evidence of a qualifying discovery of a valuable mineral deposit on any of the contested claims, we find no basis for reversal or modification of Judge Mesch's decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm the decision of the Administrative Law Judge.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge